

DUPLICATE

DOCKET FILE COPY ORIGINAL RECEIVED

OCT 29 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE

Federal Communications Commission

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MM Docket No. 97-26
Table of Allotments,)	RM-8968
FM Broadcast Stations.)	RM-9089
(Detroit, Howe and Jacksboro,)	RM-9090
Texas, Antlers and Hugo, Oklahoma))	
)	
In the Matter of)	
)	
Amendment of Section 73.202(b),)	MM Docket No. 97-91
Table of Allotments,)	RM-8854
FM Broadcast Stations.)	RM-9221
(Lewisville, Gainesville, Robinson,)	
Corsicana, Jacksboro, and Mineral)	
Wells, Texas))	

To: The Commission

Motion for Leave to File Supplement and
Supplement to Opposition to Applications for Review

Heftel Broadcasting Corporation ("Heftel"), by its counsel, hereby submits this Motion for Leave to File Supplement and Supplement to the Opposition to Applications for Review ("Opposition") which it filed with the Commission on October 9, 1998, to bring to the Commission's attention in the context of the above-referenced proceeding the recent decision of the Allocations Branch, Policy and Rules Division, Mass Media Bureau in Table of Allotments, FM Broadcast Stations (Galesburg, Illinois and Ottumwa, Iowa), DA 98-2068 (MM Docket No. 97-130; RM-8751), released October 16, 1998 (hereafter "Ottumwa," copy attached), which bears directly

upon, and supports the position taken by Heftel in its Opposition (filed prior to the issuance of Ottumwa).^{1/}

In its Opposition, Heftel contended that under Section 73.208(a)(3)(iii) of the Commission's rules, the public interest benefits of the proposal in its Petition for Rule Making to amend the FM Table of Allotments, including a downgrade of Station KYXS-FM, Mineral Wells, Texas, licensed to Jerry Snyder and Associates, Inc. ("Snyder") from Channel 241C1 to Channel 241C3 (its current operating channel) and a change in its reference point, should be compared to the public interest benefits of Snyder's pending application to upgrade Station KYXS-FM from Channel 241C3 to Channel 241C1 (BPH-961126IG). In support of its position, Heftel referred the Commission to Conflicts Between Applications and Petitions for Rule Making to Amend the FM Table of Allotments, 7 FCC Rcd 4917 (1992), recon. granted in part and denied in part, 8 FCC Rcd 4743 (1993) ("Conflicts"), which revised Section 73.208(a)(3)(iii) of the rules. Opposition, pages 15-18. Heftel quoted footnote 18 of the Commission's decision in Conflicts. Id., page 16.

Snyder and another party (Metro-Broadcasters Texas, Inc.) contend that Heftel's Petition should be dismissed, without consideration on the merits, because (among other reasons) (1) the Petition did not protect the current (Class C1) reference point for Station KYXS-FM at Mineral Wells,^{2/} and (2) Snyder's pending Channel 241C1 upgrade application was accepted for filing prior

^{1/} To the extent that permission is needed to file this Supplement, permission is hereby respectfully sought on the ground that this pleading seeks to bring to the Commission's attention a case decided subsequent to the filing of Heftel's Opposition.

^{2/} See Metro's Application for Review, pages 9-10.

to the issuance of the NPRM in this proceeding^{3/} and, of course, prior to the counterproposal/comment date specified in the NPRM.^{4/}

The Ottumwa decision is directly relevant to the foregoing issues. In that proceeding a rule making petitioner sought to modify the channel allotment for its FM station in Galesburg, Illinois and, to accomplish that result, proposed the modification of the designated but unused reference point for an FM station authorized to operate on Channel 224C3 at Ottumwa, Iowa.^{5/} Prior to the issuance of the NPRM in the Galesburg/Ottumwa proceeding, the licensee of the Ottumwa station filed an application to upgrade its station (then operating on Channel 224A) from Channel 224C3 to Channel 224C2. In Ottumwa, the Allocations Branch cited Conflicts and specifically footnote 18 thereto, and did the following: (1) it treated the timely-filed Ottumwa upgrade application as a counterproposal to the proposal in the rule making petition (Id., Paragraph 3); and (2) it evaluated the respective public interest benefits of the upgrade application and the conflicting rule making petition under the guidelines set forth in Revision of FM Assignment Policies and Procedures, 90 FCC 2d 88 (1982) ("FM Assignment Policies"). Id., Paragraph 4.

^{3/} 12 FCC Rcd 3059 (Allocations Branch, 1997).


^{4/} See Snyder's Application for Review, pages 9-11; Metro's Application for Review, pages 10-12 and 13-14.

^{5/} The background of the Galesburg/Ottumwa proceeding was remarkably similar to the instant case. The Ottumwa station was operating on Channel 224A, although the licensee had obtained through the rule making and the application processes a construction permit for an upgrade to Channel 224C3, which it had allowed to lapse and had been canceled by the Commission. See Galesburg/Ottumwa NPRM, 12 FCC Rcd 6025, at 6026, footnote 1 (Allocations Branch, 1997). Also, as in the instant case, a new reference point had been assigned to the Ottumwa station in the rule making proceeding which resulted in the Ottumwa upgrade to Channel 224C3 (Id., page 6026, footnote 2), and it was this (unused) reference point which the Galesburg petitioner sought to modify.

In Ottumwa the Allocations Branch correctly decided the issue of how to resolve a conflict between an FM upgrade application and an previously-filed FM rule making petition, and the Commission should take the same approach in the instant situation--namely, it should compare the public interest benefits of the proposal set forth in Heftel's Petition (which, as in Ottumwa, requires the modification of an existing station's designated but unused reference point^{6/}) with the public interest benefits of Snyder's pending Mineral Wells upgrade application under the standards set forth in FM Assignment Policies.

Respectfully submitted

HEFTEL BROADCASTING CORPORATION

By 

Roy R. Russo
Lawrence N. Cohn

COHN AND MARKS
1920 N Street, N.W., Suite 300
Washington, DC 20036-1622
(202) 293-3860

Its Counsel

Date: October 29, 1998

^{6/} See footnote 5, supra.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MM Docket No. 97-130
Table of Allotments,)	RM-8751
FM Broadcast Stations.)	
(Galesburg, Illinois and Ottumwa, Iowa))	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 7, 1998

Released: October 16, 1998

By the Chief, Allocations Branch:

1. The Commission has before it the Notice of Proposed Rule Making in this proceeding. 12 FCC Rcd 6025 (1997). Gillbro Communications Limited Partnership ("Gillbro Communications") filed Comments and Reply Comments. Galesburg Broadcasting Company ("Galesburg Broadcasting") filed Comments, Further Comments and Reply Comments.¹ For the reasons discussed below, we are substituting Channel 224C2 for Channel 224C3 at Ottumwa, Iowa, and are modifying the license of Station KTWB, Channel 224C3, Ottumwa, to specify operation on Channel 224C2.

Background

2. At the request of Northern Broadcast Group, former licensee of Station WLSR (formerly WGBQ), Channel 224A, Galesburg, Illinois, the Notice in this proceeding proposed the substitution of Channel 224B1 for Channel 224A at Galesburg, and modification of the Station WLSR license to specify operation on Channel 224B1.² To accommodate this upgrade, Northern Broadcast Group also proposed the modification of the reference coordinates for the Channel 224C3 allotment at Ottumwa, Iowa.

3. In regard to the Ottumwa allotment, the Notice observed that in MM Docket No. 89-365, we substituted Channel 224C3 for Channel 224A at Ottumwa, Iowa, and modified the Station KTWB license to specify operation on Channel 224C3 at Ottumwa. 5 FCC Rcd 4685 (1990). However, the construction permit to implement that upgrade expired on August 26, 1992, and was cancelled on November 18, 1992. In taking that action, we specifically stated that if the Gillbro Communications, licensee of Station KTWB, wished to remain a Class A FM station, it must submit an application on FCC Form 302 to modify the Station KTWB license and include a statement requesting that the Ottumwa, Iowa, allotment on Channel 224 be downgraded to Class A status. Gillbro Communications did not do so. Instead, on March 22, 1996, it filed

¹After the comment and reply comment dates in this proceeding, both Gillbro Communications and Galesburg Broadcasting filed Comments and/or Reply Comments. Inasmuch as these pleadings addressed engineering issues and have not delayed resolution of this proceeding, we will consider these pleadings in order to resolve this docket on the basis of a complete record.

²Galesburg Broadcasting Company is now the licensee of Station WLSR and the successor-in-interest to the original proponent in this proceeding.

a one-step upgrade application (File No. BPH-960322IC) proposing Class C2 facilities at its current site. Inasmuch as this application was filed prior to the Notice of Proposed Rule Making and comment date in this proceeding, the application was treated as a timely filed counterproposal. See Conflicts Between Applications and Petitions for Rule Making to Amend the FM Table of Allotments, 7 FCC Rcd 4917, at n. 18 (1992), recon granted in part, 8 FCC Rcd 4743 (1993).

4. Conflicting FM proposals are comparatively considered under the guidelines set forth in Revision of FM Assignment Policies and Procedures, 90 FCC 2d 88 (1982).³ In this situation, both proposals are for an upgrade of an existing facility and are considered under Priority (4) because neither proposal will provide either a first or second fulltime service under Priorities (2) or (3). Under Priority (4), we will favor the proposal that would expand service to the greatest number of persons. See Okmulgee, Nowata, Pawhuska, Bartlesville, Bixby, Oklahoma, and Rogers, Arkansas, 10 FCC Rcd 12014 (1995); Ashland, California, and Rolla and Monroe City, Missouri, 8 FCC Rcd 1799 (1993); Bowling Green and Elizabethtown, Kentucky, and Ferdinand, Indiana, 8 FCC Rcd 2097 (1993); Rocky Mount, North Carolina, 8 FCC Rcd 6206 (1993); Spring Grove and Preston, Minnesota, and Mason City, Iowa, 4 FCC Rcd 5738 (1989). In order to comparatively consider the proposals in this proceeding, it is necessary to resolve two issues. First, in comparing the Ottumwa upgrade versus the upgrade at Galesburg, we need to consider whether the proposal at Ottumwa is a Class A station upgrading to a Class C2 station or a Class C3 station upgrading to a Class C2 station. Second, inasmuch the respective population gains set forth in engineering exhibits by Galesburg Broadcasting and Gillbro Communications disagree on what Ottumwa upgrade should be comparatively considered in this proceeding, it is necessary for us to calculate the population gain of each proposed upgrade. We will resolve each issue below.

5. The Ottumwa proposal will be comparatively considered as an upgrade from a Class C3 station to a Class C2 station. We are making this determination even though Station KTWa currently operates with Class A facilities. Our reason for this determination is the fact that in MM Docket No. 89-365 we, in fact, modified the Station KTWa to a Class C3 station. That action is final and the Channel 224C3 allotment is set forth in the FM Table of Allotments. The action forfeiting and cancelling the minor change construction permit did not modify the underlying Station KTWa license to a Class A station. As stated earlier, such a modification back to a Class A station would have required Gillbro Communications to either file FCC Form 302 or a petition for rule making. Gillbro Communications has not done so. The Class C3 facility is protected in our data base and there is no impediment that would prohibit Gillbro Communications from filing a new minor change application to implement that Class C3 license modification. Moreover, Gillbro Communications can implement Class C3 facilities regardless of the outcome of this comparative proceeding. As such, there is no legal or public interest basis to consider the Gillbro Communications proposal as an upgrade from a Class A station to a Class C2 station in order to obtain a comparative advantage over a competing proposal in this proceeding.

6. In their respective engineering exhibits, Galesburg Broadcasting and Gillbro Communications have set forth the area and population gains of these upgrade proposals. The parties agree that the proposed Class B1 upgrade for Station WLSR at Galesburg would result in a net service gain to 36,560 persons in an area of 2,080 square kilometers. With respect to the Ottumwa upgrade, Gillbro Communications submitted an engineering exhibit depicting the net population and service area gain for Station KTWa from a Class A station to a Class C2 station. As discussed in the preceding paragraph, our comparative consideration of these two proposals will be based upon Station KTWa at Ottumwa upgrading from a Class C3 station to a Class C2 station. In regard to the Ottumwa upgrade from Class C3 to Class C2 station, Galesburg Broadcasting contends that there would be a net population gain of 16,249 persons in an area of 1,549 square kilometers.

³The FM priorities are as follows: (1) First fulltime aural service, (2) Second fulltime aural service, (3) First local service, and (4) Other public interest matters. Co-equal weight is given to Priorities (2) and (3).

In order to resolve this matter, we undertook our own engineering study of these two upgrade proposals.

7. We undertook our study on the basis of the centroid retrieval method based on the 1990 U.S. Census. In regard to the Galesburg upgrade, we are in substantial agreement with the net population and area gains submitted by Galesburg Broadcasting and Gillbro Communications. According to our calculations, the proposed Class B1 upgrade for Station WLSR at Galesburg would result in a net service gain to 37,157 persons in an area of 2,289.9 square kilometers. While the Galesburg gain area itself consists of 2,464.8 square kilometers containing 38,591 persons, we note that this upgrade proposal would also result in a loss of service to an area of 174.9 square kilometers containing 1,434 persons. Of this loss area and population, 41 persons in an area of 17.1 square kilometers would lose a fourth aural service and 15 persons in an area of 5.3 square kilometers would lose a fifth aural service. On the other hand, the proposed Class C3 to Class C2 upgrade at Ottumwa would result in Station KTWa serving an additional 38,492 persons in an area of 3,757.5 square kilometers without any area losing service.⁴

8. We are substituting Channel 224C2 for Channel 224C3 at Ottumwa, Iowa, and are modifying the license of station KTWa, Ottumwa, Iowa, to specify operation on Channel 224C2.⁵ This upgrade and license modification will be implemented by the Audio Services Division in processing the pending one-step application proposing Class C2 facilities for Station KTWa (File No. BPH-960322IC). We are favoring the Ottumwa upgrade because it would serve 1,535 more persons than the competing upgrade at Galesburg. In addition to the fact that the Ottumwa upgrade will result in service to a greater gain area (3,757.4 square kilometers versus 2,464.8 square kilometers), we again note that the proposed Galesburg upgrade would have resulted in a loss of service to 1,434 persons in an area of 174.9 square kilometers.

9. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective December 1, 1998, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

<u>Community</u>	<u>Channel No.</u>
Ottumwa, Iowa	224C2, 249C3

10. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Gillbro Communications Limited Partnership for Station KTWa, Ottumwa, Iowa, IS MODIFIED to specify operation on Channel 224C2 in lieu of Channel 224C3. This upgrade and license modification will be implemented by the pending one-step application by Gillbro Communications Limited Partnership (File No. BPH-960322IC) specifying Class C2 facilities.

11. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

12. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 418-2177. Questions regarding the pending one-step application specifying Class C2 facilities at Ottumwa, Iowa, should be directed to the Audio Services Division, Mass Media Bureau, (202) 418-2700.

⁴In calculating the gain in population and area, we used the Class C3 reference coordinates originally proposed by Northern Broadcast Group in its Petition for Rule Making, and the Class C2 reference coordinates set forth in the Gillbro Communications one-step application for Class C2 facilities.

⁵The reference coordinates for the Channel 224C2 allotment at Ottumwa, Iowa, are 41-01-11 and 92-27-33.

FEDERAL COMMUNICATIONS COMMISSION

**John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau**

CERTIFICATE OF SERVICE

I, Cecy Ivie, an Administrative Assistant in the law firm of Cohn and Marks, hereby certify that on the 29th day of October, 1998, copies of the foregoing "Motion for Leave To File Supplement and Supplement to Opposition to Applications for Review" were mailed first-class, postage prepaid, to the following:

John Karousos
Allocations Branch
Mass Media Bureau
2000 M Street, N.W.
Fifth Floor
Washington, DC 20554

Harry C. Martin, Esq.
Andrew S. Kersting, Esq.
Fletcher, Heald & Hildreth, P.L.C.
1300 North 17th Street
11th Floor
Rosslyn, VA 22209-3801
(Counsel to Metro Broadcasters-Texas, Inc.)

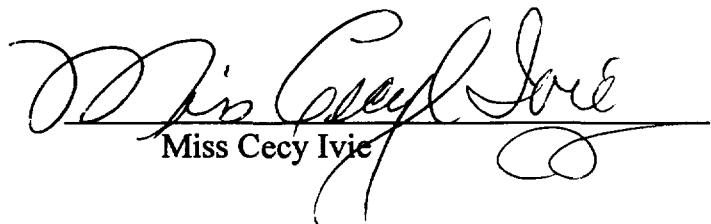
Erwin G. Krasnow, Esq.
Verner, Liipfert, Bernhard,
McPherson and Hand
901 15th Street, N.W.
Washington, DC 20005-2301
(Counsel for Graham
Newspapers, Inc.)

Mark N. Lipp, Esq.
Shook, Hardy & Bacon, L.L.P.
801 Pennsylvania Avenue, N.W.
Suite 600
Washington, DC 20004
(Counsel to Hunt Broadcasting, Inc.)

Robert W. Healy, Esq.
Smithwick & Belendiuk, P.C.
1990 M Street, N.W.
Suite 510
Washington, DC 20036
(Counsel to Jerry Snyder
and Associates, Inc.)

John F. Garziglia, Esq.
Patricia M. Chuh, Esq.
Pepper & Corazzini, L.L.P.
1776 K Street, N.W.
Suite 200
Washington, DC 20006
(Counsel to K95.5, Inc.)

William J. Pennington, Esq.
Law Office of William J. Pennington, III
P.O. Box 403
Westfield, MA 01086
(Counsel to Great Plains Radiocasting)


Miss Cecy Ivie